

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

RECEIVED

FEB 17 1995

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

In the Matter of)

Amendment of the Commission's Rules)
to Preempt State and Local Regulation)
of Tower Siting for)
Commercial Mobile Services Providers)

RM - 8577

DOCKET FILE COPY ORIGINAL

COMMENTS OF VANGUARD CELLULAR SYSTEMS, INC.

Vanguard Cellular Systems, Inc. ("Vanguard"), by its attorney, hereby comments on the December 22, 1994 Petition for Rulemaking ("Petition") filed by the Cellular Telecommunications Industry Association ("CTIA") in the above-captioned proceeding. Vanguard subsidiaries are the nonwireline licensees and operators of twenty-six cellular telephone systems in ten states, providing service to approximately 275,000 subscribers. Vanguard strongly supports CTIA's request that the Commission initiate a rulemaking to preempt local regulations that hinder the ability of commercial mobile radio services ("CMRS") licensees to maximize availability of CMRS to the public and to compete on a level playing field.

DISCUSSION

As CTIA points out, Congress, in revising Section 332 of the Communications Act, expressly prohibited state regulation of entry into the CMRS marketplace. Petition at 4 (citing 47 U.S.C. § 332(c)(3)(A) (1993)). Furthermore, Congress has directed the Commission to take steps to make CMRS available to the largest number of users and to enhance competition among CMRS providers. Petition at 5 (citing 47 U.S.C. § 332(a)(2),

No. of Copies rec'd
List ABCDE

024

(a)(3)). Local zoning rules, and the related actions of local authorities, that unnecessarily encumber the ability of CMRS licensees to establish needed facilities are inimical to the goals of Congress and the Commission.

The Commission has the authority to accomplish Congress' goals with respect to CMRS facilities through preemption of state and local regulation. The Supreme Court has held that a federal agency may preempt state law when "the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress." Louisiana Public Service Commission v. F.C.C., 476 U.S. 355, 368-69 (1986). See also Petition at 11-13 (discussing Louisiana PSC and related cases). As CMRS providers have learned, and as the examples presented below demonstrate, local rules restricting installation or improvement of CMRS facilities often result in significant unwarranted expense and delay, if not impossibility, in making full and effective service available to the public. This represents a tremendous "obstacle to the accomplishment and execution of the full objectives of Congress" with respect to CMRS, and must be addressed by the Commission.

To illustrate the harm that can result from local regulation of CMRS facilities, Vanguard offers the following two examples from its own experience.

Blairstown Township, New Jersey

In February 1994, Pennsylvania Cellular Telephone Corp. ("PCTC"), a subsidiary of Vanguard and the nonwireline cellular telephone licensee in the Allentown-Bethlehem-Easton, PA/NJ metropolitan statistical area ("MSA"), which includes Blairstown Township, applied to the Township Zoning Board of Adjustment (the "Blairstown Board") for a variance of the Township zoning ordinance for construction of a tower on property in

an area zoned for industrial use. The Blairstown Board denied the application. A copy of its written decision is attached hereto as Exhibit A (the "Blairstown Decision").

PCTC's application for a variance was necessary because, under the zoning ordinance, "[c]ellular telephone antenna towers are not a permitted principal, accessory, nor conditional use in any of the zone districts, residential or non-residential, in Blairstown Township." Blairstown Decision at 8 (emphasis added). Two appraisers reported to the Blairstown Board that the tower would not have "significant impact upon the utility or value of surrounding properties." Id. at 12-13. A third appraiser, representing local residents, disagreed. Id. at 13-16.

In ruling against PCTC, the Blairstown Board concluded that PCTC had failed to demonstrate that the tower would (i) "not be a substantial visual negative and, therefore, a substantial detriment to the public good," and (ii) "not negatively impact upon the market values of real estate in the area proximate thereto, whether that adverse impact . . . be strictly objective or subjective." Id. at 16. The Blairstown Board also dismissed the fact that the site in question was zoned for industrial, and not residential, uses. Id. at 17-18.

In its discussion of the showing required of PCTC to obtain a use variance under New Jersey case law, the Blairstown Board considered whether the purpose of the proposed use was "inherently beneficial." Id. at 21-24. Remarkably, while conceding that cellular telephone service would ordinarily be deemed inherently beneficial, the Board decided that it was not in this case, because: (i) the wireline licensee in the MSA already provided full and effective coverage, thanks, in part, to new antennas that it had installed (subject to a use variance granted by the Blairstown Board) on an existing cable television

tower, and (ii) the facility planned by PCTC was intended to improve PCTC's existing service by filling coverage gaps in the areas served by existing facilities, and not to establish a new service. Id. In other words, the Blairstown Board effectively disregarded federal law, deciding that full coverage by a single cellular carrier was sufficient.

PCTC continues to experience reduced coverage in parts of the service area in and around Blairstown Township, and continues to incur significant expense in its attempts to improve that coverage. On November 28, 1994, PCTC filed a complaint in the Superior Court of New Jersey in Warren County, seeking to overturn the Blairstown Board's decision. The matter remains unresolved.

Clifton Township, Pennsylvania

PCTC is also the nonwireline cellular telephone licensee in the Northeast Pennsylvania, PA MSA which includes Clifton Township. In December 1993, PCTC applied to the Clifton Township Board of Supervisors (the "Clifton Board") for a conditional use permit to construct a tower and transmitter facility on a piece of private property within the Township. The Clifton Board denied the application. In this case, the actions of the Clifton Board were reversed by the Court of Common Pleas of Lackawanna County (the "Court"). A copy The Court's Memorandum and Order (the "Order") is attached as Exhibit B.

The Clifton Board determined that the application should not be granted because residents near the proposed tower site "expressed concern about tower lights which would be visible from their homes and possibly shine in their residences at night, which may interfere with the use of their homes during the evening hours." Order at 3-4. In view of

this potential "harm" to nearby residents, the Clifton Board further held that PCTC had not demonstrated that some alternative site, in a less-populated part of the Township, would not be suitable for its needs. Id. at 5.

The Court determined that the "overwhelming weight of the evidence [presented to the Clifton Board] showed that the proposed project would have little or no effect on area residents and the properties they own," and ordered that PCTC's conditional use application be granted. Id. at 6, 7. However, Clifton Township has indicated that it intends to appeal the Court's decision. Meanwhile, over one year after filing its initial application, PCTC still is unable to construct the tower needed to provide full and effective service to the residents of the area around Clifton Township, and continues to incur significant costs in its efforts to do so.

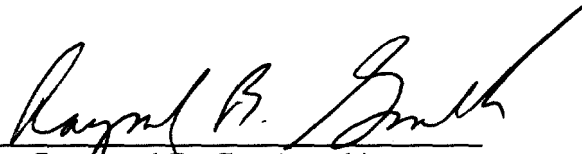
CONCLUSION

These are only two of the many examples of ways in which local land use regulations, and related procedural roadblocks, operate to thwart the efforts of CMRS licensees to provide affordable and effective service to the public. The direct costs to PCTC of prosecuting just the two applications described above have already exceeded one hundred thousand dollars, including fees for legal and engineering services, among others, which will undoubtedly drive up costs to PCTC's customers. These costs are compounded by service reduction due to delays in accomplishing system buildout and upgrades. Excessively restrictive local regulations serve only to impede the public's access to mobile services, and to inhibit full competition in the CMRS marketplace.

To reduce the ability of local authorities to frustrate the intent of Congress, and the Commission, regarding mobile services, Vanguard respectfully requests that the Commission act on CTIA's Petition by issuing a Notice of Proposed Rulemaking proposing to preempt local land use regulation of CMRS facilities.

Respectfully submitted,

VANGUARD CELLULAR SYSTEMS, INC.

By: 

Raymond B. Grochowski
LATHAM & WATKINS
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004

February 17, 1995

CERTIFICATE OF SERVICE

I, Raymond B. Grochowski, hereby certify that the foregoing Comments of Vanguard Cellular Systems, Inc. was served this 17th day of February, 1995, by first class mail (except as otherwise indicated), on the following:

- * Reed Hundt, Chairman
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554
- * James H. Quello, Commissioner
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554
- * Andrew C. Barrett, Commissioner
Federal Communications Commission
1919 M Street, N.W.
Room 826
Washington, D.C. 20554
- * Rachelle B. Chong, Commissioner
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554
- * Susan Ness, Commissioner
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554
- * Regina Keeney, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 5002
Washington, D.C. 20554

* Rosalind Allen, Chief
Commercial Radio Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 5202
Washington, D.C. 20554

Michael F. Altschul, Esq.
Cellular Telecommunications Industry Association
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

Philip L. Verveer, Esq.
Jennifer A. Donaldson, Esq.
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036-3384

* indicates hand delivery.

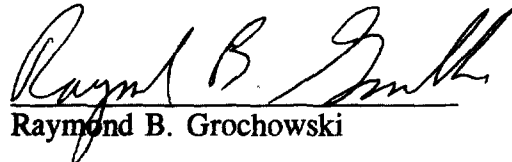

Raymond B. Grochowski

EXHIBIT A

BLAIRSTOWN TOWNSHIP ZONING BOARD OF ADJUSTMENT
RESOLUTION MEMORIALIZING THE DENIAL OF A CERTAIN USE
OR "SPECIAL REASONS" VARIANCE SOUGHT PURSUANT TO
N.J.S.A. 40:55D-70(d)(1), TO THE APPLICATION
OF PENNSYLVANIA CELLULAR TELEPHONE CORPORATION
SEEKING APPROVAL FOR THE ERECTION OF A CELLULAR
TELEPHONE TOWER ON BLOCK 2003, LOT 14.01,
ON THE BLAIRSTOWN TOWNSHIP TAX MAP
APPLICATION ZB-2-94

WHEREAS, having been made on February 22, 1994, by Pennsylvania Cellular Telephone Corporation, having its office and place of business at 2002 Pisgah Church Road, Suite 300, Greensboro, North Carolina 27455, to the Blairstown Township Zoning Board of Adjustment for the grant of a use or "special reasons" variance pursuant to N.J.S.A. 40:55D-70(d)(1), to wit, for a "use or principal structure in a district restricted against such use or principal structure", so as to permit the erection of a proposed one hundred, eighty (180) foot telecommunications (cellular telephone) antenna tower, together with an equipment or "control building" ancillary thereto and located within a proposed 100 foot by 100 foot leasehold area, together with a proposed 12 foot width access driveway, all to be located on property presently owned by Howard R. Hill, Jr. and Norma M. Hill, said property known and designated as Block 2003, Lot 14.01, as designated on the Blairstown Township Tax Map, said lot constituted of an area of 19.97 acres, being accessed via "Hillview Lane", a private road which connects same with the Hope Road, a/k/a Warren County Route 521, said property being located within the I-Industrial Zone District; and,

WHEREAS, in that the proposed tower structure and the attendant "control building" are neither permitted principal, accessory nor conditional uses or structures in the I-Industrial Zone District in which said property is located, the structures proposed (tower and equipment

building) and the use thereof (for telecommunications purposes) necessitate the grant of a use or "special reasons" variance pursuant to N.J.S.A. 40:55D-70(d)(1); and,

WHEREAS, the applicant having also submitted, simultaneously with the application for the use or "special reasons" variance, an application for site plan review and approval over which the Board has ancillary jurisdiction pursuant to the provisions of N.J.S.A. 40:55D-76(b), but the applicant having elected, at the hearing held upon the application commencing on March 8, 1994, to bifurcate the administration of the application and proceed first with the use variance aspect, the applicant acknowledging that the 120 day time frame within which the Board of Adjustment is obliged to act pursuant to N.J.S.A. 40:55D-76(c), would not commence to run thereon until the Board's administration of the use variance application was complete and a decision was rendered thereon; and,

WHEREAS, the applicant having additionally applied for a variance for direction for issuance for a building permit pursuant to N.J.S.A. 40:55D-36 from the requirement of N.J.S.A. 40:55D-35 that "no permit for the erection of any building or structure shall be issued unless the lot abuts a street giving access to such proposed building or structure" and the applicant having also indicated to the Board, at the initial hearing held on the application at the regular meeting of March 8, 1994, that the variance pursuant to N.J.S.A. 40:55D-36 would best be heard and decided in the context of the ancillary site plan review application and that, consequently, the applicant would not be pursuing that aspect of the application, nor would the time frame within which the Board is obligated to decide that variance commence until after the Board had completed its administration of the use variance application; and,

WHEREAS, notice of the application for the use or "special reasons" variance, as hereinabove described, and as

particularly contained in the application form submitted, was served upon property owners located within 200 feet of the subject premises and to others required to be given notice and notice thereof having been published, once, in the official newspaper of the Township of Blairstown, all in a proper and timely manner as is required by N.J.S.A. 40:55D-12 and the Board having determined, based upon the advice and recommendation of its attorney, that proper, timely and adequate notice of the relief being sought before the Board was provided in compliance with the provisions of N.J.S.A. 40:55D-12 and the Board was vested with jurisdiction to hear the application and to take Official Action with respect thereto; and,

WHEREAS, a hearing upon the application was convened before the Blairstown Township Zoning Board of Adjustment at its regular meeting of March 8, 1994, at which the applicant appeared, through Mr. Owen Ulmer, the real estate manager for the applicant's Allentown region, and at which the applicant was represented by counsel, to wit, Joel A. Kobert, Esq., of the firm of Courter, Kobert, Laufer & Cohen; and,

WHEREAS, the hearing upon the application was continued to the following meetings of the Board: April 12, 1994; May 10, 1994; June 14, 1994; July 12, 1994; August 8, 1994; and September 13, 1994, at which the Board's administration of the application was concluded and Official Action was taken with respect thereto, all as more specifically set forth hereinbelow; and,

WHEREAS, the Board of Adjustment having taken the testimony of various witnesses presented on behalf of the applicant, the testimony of various objectors and other parties interested in the application, all as appears in Appendix I annexed hereto and made a part hereof, and the Board having received into evidence various plats, documents and exhibits, all as appears in Appendix II, attached hereto

and made a part hereof, and the Board having excluded from evidence and not having considered, based upon the proposed exhibits being hearsay testimony, the documentary evidence, all as appears in Appendix III, attached hereto and made a part hereof; and,

WHEREAS, as a result of the hearings held upon the application, as aforesaid, the Blairstown Township Zoning Board of Adjustment hereby makes the following basic FINDINGS OF FACT:

1. Applicant, Pennsylvania Cellular Telephone Corporation, which has its place of business at 2002 Pisgah Church Road, Suite 300, North Carolina 27455, is a wholly-owned subsidiary of Vanguard Cellular Telephone Corporation which, in turn, is a wholly-owned subsidiary of Vanguard Cellular Systems, Inc., a publicly-held corporation engaged in the provision of cellular telephone service in the region, including the Warren County, New Jersey area, pursuant to a Federal Communications Commission (FCC) license as an "Area "A"" service provider.

Rev. 11/3/94

2. Although the applicant acts as a common carrier of telecommunication services, it is not a public utility within the provisions of Section 19-6.1(a)(1) of the Blairstown Township Land Development Ordinance which provides as follows:

"a. Public Utility Uses.

1. For purposes of this Chapter, the term "public utility uses" shall include such uses as telephone dial equipment centers, power substations and other utilities serving the public, such as sewage treatment plants, but shall exclude dumps, sanitary landfills, service or storage yards, or similar uses."

3. The applicant has submitted an application for the grant of a certain use or "special reasons" variance and a companion application for site plan review and approval ancillary to which a variance for direction for issuance of a building permit was sought, all in order to facilitate the erection of a 180 foot overall height cellular telephonic communications antenna tower on property known and designated as Block 2003, Lot 14.01, on the Blairstown Township Tax Map.

4. The subject property (Block 2003, Lot 14.01) is presently owned by Howard R. Hill, Jr. and Norma M. Hill and is a parcel constituted of an area (as per the site development plan prepared by R.K.R. Hess Associates) of 19.97 acres.

5. The subject property "fronts" upon and is provided access via Hillview Lane, which is not a public street "...certified to be suitably improved to the satisfaction of the governing body..." as is otherwise required by N.J.S.A. 40:55D-35. Therefore, a variance for direction for issuance of building permit sought ancillary to the use variance and site plan review applications pursuant to N.J.S.A. 40:55D-36 is also required. Hillview Lane ultimately connects the subject property with Hope Road, a/k/a Warren County Route 521.

6. The applicant proposes to erect (as per the Malouf Engineering International, Inc. plat entitled: "Tower Face Elevations Section Plans, 180' Rohn SSVR S.S. Tower, Vanguard Cellular Tower Systems") a 180 foot free-standing, self-supporting steel tower which will have a total overall height of 180 feet, exclusive of six whip antennas on the top thereof, which whip antennas will have an additional height (by scale from the plats submitted) of 12 feet.

7. Additionally, there will be located on the tower, three microwave dish antennas, one having a diameter of 8

feet at the higher elevation (of 120 feet AGL) and two having diameters of 6 feet at the lower (90 feet AGL and 100 feet AGL) levels.

8. The applicant proposes to erect a "control building" which will house the power supply and telecommunications electronic and electrical facilities and equipment in proximity to the tower, which will be a structure having dimensions of 12 feet by 20 feet and an overall height of approximately 10 feet.

9. The 180 foot telecommunications tower and the 12 foot by 20 foot "control building" will be surrounded by a chain link fence, having an overall height of 8 feet 0 inches. The ground surface around the structures is proposed to be improved with a 4 inch thick stone or gravel surface.

10. The applicant is proposing to lease from Howard R. Hill, Jr. and Norma M. Hill, the owners of the subject property (Block 2003, Lot 14.01), a 100 foot by 100 foot leasehold area in the approximate center of which the telecommunication tower and "control building" will be located.

11. There is presently located upon a lot adjacent to the subject property, the existing single-family dwelling house owned and occupied by property owners, Howard R. Hill and Norma M. Hill, together with an existing barn and an existing shed, none of which structures or the driveway accessing same are intended to be disturbed by the proposed tower and access driveway thereto.

12. Access to the subject property and to the tower and supporting facilities to be established in conjunction therewith is proposed to be achieved via an existing driveway (possibly subject to further improvements), located on the subject property and within the limits of the right-of-way of "Hillview Lane", which is a private road, street or highway connecting same with Hope Road, a/k/a

County Route 521, located some considerable distance to the east thereof.

13. Hillview Lane does not comply with the requirements of N.J.S.A. 40:55D-35 that a building lot must abut a public street giving access thereto, which street shall have been suitably improved to the satisfaction of the governing body or such suitable improvements shall have been assured by means of a performance guarantee in accordance with standards and specifications for road improvements approved by the governing body as adequate in respect to the public health, safety and general welfare of the special circumstances of the particular street.

14. Consequently, relief from the requirements of N.J.S.A. 40:55D-35 (that a lot to which a building permit is issued must abut an existing improved and approved public street) has been sought pursuant to N.J.S.A. 40:55D-36, although that aspect of the application relief has been bifurcated at the request of the applicant, was not reached by the Board and need not be reached, in that the primarily relief, to wit, the use variance, was denied.

15. Consequently the suitability of access issue via the private driveway existing on Hillview Lane, a private road, was not reached or decided by the Board.

16. The subject property is located in the I-Industrial Zone District wherein, by virtue of the provisions of Chapter XIX-Land Development, Section 19-4.6(a), of the Code of the Township of Blairstown, the following are the permitted principal uses of lands and buildings: farms, office and office buildings, research and engineering activities (subject to certain limitations stated therein), indoor commercial recreational facilities (subject to certain limitations stated therein), manufacturing (subject to certain limitations stated therein), wholesale distribution centers and warehouses, industrial parks on tracts of at least 25 acres, public utility uses as

Rev. 11/3/94

conditional uses under N.J.S.A. 40:55D-67 (and pursuant to Section 19-6.1) relating to standards applicable thereto, and airports.

17. By virtue of the provisions of Section 19-4.6(b), the following accessory uses are permitted: off-street parking and private garages, fences and walls, signs, temporary construction trailers (subject to certain limitations set forth therein) and employee cafeterias.

18. By virtue of the provisions of Section 19-4.6(c), the maximum height of a building or structure shall not exceed 30 feet or 2 1/2 stories (lower height limitations apply within the Air Safety Zone).

19. It is further provided that the height of a building may be increased to a maximum of 50 feet, providing for every foot in height in excess of 30 feet, the buffer area shall be enlarged 2 feet in width.

20. However, by virtue of Section 19-6.2(b), no height limitations apply to the proposed antenna tower. Therefore, no variance with respect to height is required, nor has any such variance been sought.

21. In that the proposed structure (a 180 foot telecommunications tower with attendant "control building") is neither a permitted principal, accessory, nor conditional use in the I-Industrial Zone District, a use or "special reasons" variance pursuant to N.J.S.A. 40:55D-70(d)(1) is required, as has been sought by the applicant.

22. Cellular telephone antenna towers are not a permitted principal, accessory, nor conditional use in any of the zone districts, residential or non-residential, in Blairstown Township. Consequently, the establishment of any such structure and use, no matter where located in the Township, requires the grant of a use variance.

23. On account of the extreme height of the tower (180 feet above prevailing terrain level), it would be readily visible from a number of vantage points and a number of

other properties in proximity to and some considerable distance from the site, although it appears from the testimony presented that some buffering of the visibility of the tower would be achieved by existing trees, proposed to be left undisturbed.

Rev. 11/3/94

24. It appears from the testimony of the witness for the applicant that at least twelve residentially improved properties would have a clear view of the proposed tower and that additional residences, which will presumptively be constructed in the future, would also share a clear view of the tower.

25. Despite a request by Board members that the applicant do so, the applicant has declined to conduct a "balloon test" which would involve flying a tethered, brightly-colored and sufficiently sized balloon to a height of 180 feet above the site of the proposed tower and the conduct of a visibility study from various vantage points within the immediate and surrounding areas to better determine the number of properties affected by visibility of the tower.

26. Consequently, the Board was unable to thoroughly evaluate, with any degree of certainty, the total number and locations of properties that would be affected by way of having direct visibility of the proposed tower.

27. At the meeting of the Blairstown Township Zoning Board of Adjustment held on September 14, 1993, the Board consider the application of Bell Atlantic Mobile Systems, Inc., for a use variance and for preliminary and final site plan approvals to facilitate installation of four antennas on the existing cable television tower owned by Service Electric Cable T.V. located on property known and designated as Block 301, Lot 10.13, on the Blairstown Township Tax Map, said property owned (at the time of the application) by J. Scirocco and John Stritehoff, a parcel constituted of an area of 6.0 acres and located at the end of "Mountain

Terrace", which runs northerly from and connects with Walnut Valley Road.

28. That site is located at or near the highest point of the ridge of the Kittatinny Mountains and offered an optimum terrain and topographical location to enhance the telecommunications (cellular phone) capabilities of former applicant, Bell Atlantic Mobile Systems.

29. The Board of Adjustment, in granting that prior application for co-location of former applicant, Bell Atlantic Mobile Systems, of four antennas on the existing tower, found that the then existing cellular telephone service within the Township did not meet minimum standards for such service and many "gaps" (service interruptions) of cellular telephone coverage existed prior to the proposed installation and was the motivating factor for that prior application.

30. The Blairstown Township Zoning Board of Adjustment, in its Resolution approved and adopted on October 12, 1993, in the Bell Atlantic Mobile Systems, Inc. application to co-locate on the existing Service Electric Cable T.V. tower on Block 301, Lot 10.13, found that:

i. The granting of the variance would benefit the area residents in that it would provide improved cellular phone service as well as improved communications for local fire and police personnel.

ii. A special reason existed for granting the variance since the proposed use would provide improved service to residence (sic) and improve communications of emergency personnel.

iii. The variance would not be

inconsistent with the Township Master Plan since public utility towers are allowed on the subject site and the only difference is that the antennas to be installed upon the towers are not considered a public utility use.

iv. No height variance was required to be granted, in that the application proposes installation of antennas on an existing tower and which installation will not increase the overall height of same.

31. The present applicant has amply demonstrated to the Board that the tower will be constructed and operated in strict compliance with all applicable Federal Communications Commission (FCC) requirements.

32. Additionally, the applicant presented a letter dated March 23, 1993, from Edward E. Adcock, Specialist, Systems Management Branch of the Federal Aviation Administration (FAA) indicating, in part, that:

"The proposed construction would not exceed FAA obstruction standards and would not be a hazard to air navigation. Obstruction marking and lighting are not necessary."

33. The Board has not dealt with or determined any issues relating to electromagnetic (EM) radiation which would emanate from the facility, in that the Board is preempted from considering and deciding such issues by the Commission on Radiation Protection of the Department of Environmental Protection and Energy under the New Jersey Radiation Protection Act (N.J.S.A. 26:2D-1, et seq.).

34. The applicant employed the services of Robert McNeely Vance, a licensed real estate broker, certified tax assessor and certified general appraiser of the State of New Jersey of the firm of Robert McNelly Vance and Co. of Somerville, New Jersey, to conduct an analysis of the impacts of the proposed use on neighboring property values.

35. By a report dated May 6, 1994, and admitted into evidence as Exhibit A-11, said report entitled: "Analysis of Impacts of a Proposed Use on Neighboring Property Values", Mr. Vance concludes, in pertinent part, that:

"...(the construction) would occur in a location that has significant spatial and physical buffering from neighboring existing and proposed residential uses, and that both of the proposed facilities and the nearby residence (sic) are located within the I-Industrial Zone which does not permit residential uses. Further, a review of actual market experience in other locations has indicated that towers and antennas such are as proposed for the subject property do not have any significant, negative value impacts upon residential properties even where such properties have locations equally or more proximal to the towers and are situated within residentially zoned neighborhoods."

"It is, therefore, the opinion of this appraiser that the proposed use can be installed on the subject property without significant negative impacts upon the utility or value of surrounding properties."

36. The opinion of Mr. Vance (that the proposed use would have no significant negative impacts upon the value of properties in the area) was shared by Daniel Fielder of Fiedlers Appraisal Associates in a report dated June 15, 1994, and accepted by the Board into evidence as Exhibit A-21.

37. However, Richard I. Clark, Esq., of the firm of Laddy, Clark, Coffin and Ryan, who appeared on behalf of Partridge Glen Associates, in opposition to the granting of the variance sought, offered the testimony of Lee H. Pavel, an MAI real estate appraiser of the firm of Benchmark Appraisal, Inc., who presented a report dated July 8, 1994.

38. In that report, Mr. Pavel concluded, in part, as follows:

"The uses in the surrounding neighborhood are primarily residential in nature. There are newer single-family dwellings to the east, of which the closest one is approximately five hundred (500') feet from the proposed antenna tower. To the northwest, there is a newer subdivision of single-family dwellings being developed. Further to the west and east, there are a number of somewhat older, single-family dwellings. Some of these dwellings are not in visual range of the subject antenna tower."

"In analyzing the effect of the proposed tower on surrounding property uses, the appraiser considered any potential nuisances that the tower, or its use, could create that would detract from the quality, utility, or marketability of the surrounding residential

properties. In evaluating nuisances, there are two which the appraiser believes will have such an effect."

"First, there is the visual nuisance that the presence of an antenna tower, and its accessories, will have in a rural environment such as the subject neighborhood. Second, there is an environmental nuisance caused by the stigma of potential electromagnetic frequency emissions from the microwave transmission use."

"For those properties that are within relatively close visual range of the proposed tower, such as the homes on Hillview Lane and the Partridge Glen Associates properties, it is the opinion of the appraiser that the presence of the cellular antenna tower will adversely affect the value and marketability of those properties...typical home purchasers in such a setting do not expect to have nearby views of lattice type antenna towers looming near their neighborhoods. Admittedly, the base of the structure will be buffered by woods at the perimeter of the site. However, the presence of a 180+/- foot tall antenna tower represents a technological intrusion that is not expected in a rural environment, and detracts from the aesthetics of the neighborhood."

"The appraiser's research in magazine articles and journals (from engineering to medical), indicates that experts can not

(sic) really agree whether or not there is an adverse effect on human beings living in residences near artificial sources of electromagnetic frequency, such as microwave transmission sources. This being the case, and the public being aware of it, creates a stigma for residences (sic) near such sources. While a portion of the market segment may not know or care about such matters, there will always be a segment of the market which is aware. By limiting the market segments for a residence, its marketability is limited."

Rev. 11/3/94

"Real estate experts and journals agree in these matters. When there is an environmental nuisance, electromagnetic or otherwise, there remains a stigma, even if the nuisance is not scientifically proven. The fact that a potential nuisance is not disapproved (sic) creates the market resistance that causes the stigma in this instance."

"...Regardless of the radio type (cellular or microwave) or the relative signal strength (500 milliwatts to the thousands of watts of a television transmission antenna), the article concluded that people will have a resistance to purchasing a home near a radio antenna tower. When this occurs, the portion of the market that fears the towers are eliminated from the pool of potential buyers. According to modern real estate thought, this

automatically creates a loss in value, since the home affected by the proximity to the tower can not (sic) be marketed to the full pool of purchasers. In short, when a radio tower nuisance eliminates a portion of the potential market for a home, value is adversely affected."

39. In analysis of the foregoing appraisal evidence, the Board finds that the applicant has failed to demonstrate satisfaction of the so-called "negative criteria" contained in N.J.S.A. 40:55D-70, to wit, that: "No variance or other relief may be granted under the terms of this section unless such variance or other relief may be granted without substantial detriment to public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance."

40. Specifically, the Board concludes the applicant has failed to demonstrate that the proposed 180 foot high tower, which will be readily visible from great distances within the Township and from existing residences and residential properties in proximity thereof, will not be a substantial visual negative and, therefore, a substantial detriment to the public good.

41. Furthermore, the Board herewith concludes that the applicant has also failed to demonstrate that the erection of the tower will not negatively impact upon the market values of real estate in the area proximate thereto, whether that adverse impact (on the values of surrounding properties) be strictly objective or subjective.

42. That is, the Boards finds that, from the testimony of Lee Pavel, the MAI appraiser offered by objector, Partridge Glen Associates, without regard to there being a demonstrably reliable and objective scientific basis therefor, there is a common public perception of there being